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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JEFF BINGAMAN
Attorney General of
New Mexico

THOMAS L. DUNIGAN
Deputy Attorney General

P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 982-6993

Attorneys for Petitioners

Of Counsel:

PAUL A. LENZINI
TARA HARVEY
CHAPMAN, DUFF AND PAUL
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-8800

PANDICK PRESS, WASHINGTON—1601 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's instruction to reconsider its original decision in this case in light of *Montana v. United States*, 450 U.S. 544 (1981).

2. Whether the Mescalero Apache Tribe has "inherent authority" over wildlife within the Mescalero Apache Reservation which preempts the application of state game and fish laws to non-Indians hunting or fishing within the Reservation.

3. Whether the authority of the State of New Mexico to impose its game and fish laws on non-Indians hunting and fishing on the Mescalero Apache Reservation has been preempted by federal legislation or treaty stipulation.

4. Whether the application of state game and fish laws to non-Indians hunting and fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe "to make its own laws and be governed by them" contrary to *Williams v. Lee*, 358 U.S. 217 (1959).

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MESCALERO APACHE TRIBE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and Harold F. Olson, individually and as Director of the New Mexico Department of Game and Fish, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 26, 1982, on remand from the Supreme Court of the United States. This Court previously granted the petition for writ of certiorari filed in this case by these petitioners, vacated the former decision of the United States Court of Appeals for the Tenth Circuit and remanded this proceeding to that court for further consideration in light of the decision of this Court in *Montana v. United States*, 450 U.S. 544 (1981). 450 U.S. 1036 (1981). The decision of the Tenth Circuit following remand is the subject of this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit on remand from the Supreme Court of the United States is reported at 677 F.2d 55 (1982) and appears in the Appendix at 2a. The former opinion of the United States Court of Appeals of the Tenth Circuit, which was previously vacated by this Court, is reported at 630 F.2d 724 (1978) and appears in the Appendix at 8a. The judgment entered in this case by the United States District Court for the District of New Mexico on August 2, 1978, which appears in the Appendix at 35a, is unreported. The memorandum opinion of the District Court of August 2, 1978, which appears in the Appendix at 37a, is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on remand from the Supreme Court of the United States, was filed on April 26, 1982 (Appendix at 2a). On June 25, 1982, Mr. Justice White extended the time within which to file a petition for writ of certiorari to and including August 25, 1982 (Appendix at 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Material portions of pertinent treaty and statutory provisions are included in the Appendix at 54a *et seq.*

STATEMENT OF THE CASE

A. The Factual Background.

In July 1975, the Mescalero Apache Tribe opened the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico.

The Inn of the Mountain Gods is a deluxe, tourist resort featuring a luxury hotel, a stocked lake for fishing, boating, and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stable complex, paddle tennis courts, restaurants, liquor lounges, and convention facilities (R. Vol. I, p. 120).[1] The Inn is operated by the Mescalero Apache Tribe as part of a tourism program established by the Tribe to attract non-Indians to the Reservation as well as to the Sierra Blanca Ski Resort, a tribal commercial enterprise located adjacent to the Reservation. In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (R. Vol. I, pp. 121-122). The Inn of the Mountain Gods, as well as the Tribe's hunting and fishing business, caters almost exclusively to non-Indian patrons from across the country. At least 97 percent of the guests at the Inn of the Mountain Gods, including hunters and anglers, are non-Indians from off the reservation (R. Vol. I, pp. 121-122). Public highways and other State public facilities and services are used by persons hunting and fishing on the Mescalero Apache Reservation (R. Vol. I, p. 136).

In 1977 the Mescalero Apache Tribe adopted a general hunting and fishing ordinance which states it is applicable to all persons, Indian and non-Indian, who hunt or fish on the Reservation. The ordinance requires non-Indians to purchase a tribal permit, and it establishes seasons and bag limits. The ordinance also declares that "no state license of any kind shall be necessary for any person" with respect to hunting or fishing on the Mescalero Apache Reservation (R. Vol. I, p. 122).[2]

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[1] "R. Vol." refers to a particular volume of the record filed in the Tenth Circuit.

[2] Prior to 1977 the tribe's hunting brochures stated that all New Mexico hunting regulations apply on the Reservation (R. Vol. I, p. 125).

Both federal and state agencies have assisted the Tribe's hunting and fishing business. In 1966 and 1967 the National Park Service donated 162 elk to the Tribe. These were shipped into New Mexico pursuant to a permit issued by the New Mexico Game and Fish Department which had encouraged the project (R. Vol. I, p. 124). A Bureau of Indian Affairs range conservationist makes aerial surveys and pellet group transect studies to estimate deer, elk, antelope and bear populations, and he recommends seasons and bag limits for these species to the Tribal Council (R. Vol. I, pp. 122, 123). The U.S. Fish and Wildife Service provides technical assistance respecting management of fish, and the Service stocks reservation streams and several man-made lakes built with federal funds (R. Vol. I, p. 123).

The New Mexico Department of Game and Fish has in the past stocked streams on the Reservation and has supplied other assistance including the training of conservation officers at the request of the Tribe (R. Vol. I, pp. 123, 124-124). The elk, deer and bear populations in south central New Mexico range freely on and off the Mescalero Apache Reservation throughout the year (R. Vol. I, p. 124). Moreover, the State has maintained wildlife conservation programs of long standing in areas surrounding the Reservation (R. Vol. I, pp. 124-128), and State officers enforced wildlife laws and regulations on the Reservation against nontribal members until 1969 when the Tribe informed the State that its fish and game officers would no longer be welcome on the Reservation without tribal permission (R. Vol. I, pp. 130, 131). Thus, the assertion by the Court of Appeals that the State is unable to claim that it or its lands played any significant role in the creation and preservation of the reservation wildlife resource is contradicted by the record.

From at least 1971 through the period of this litigation, virtually all of the big game permits authorized by the Mescalero Apache Tribe have been sold (R. Vol. I, pp. 138-139). The non-Indian demand for big game and package hunts has each year exceeded the number of

permits available (R. Vol. I, p. 135). Revenues from the tribal hunting and fishing program as well as from the operation of the Inn of the Mountain Gods have increased annually over the last several years (R. Vol. I, pp. 135-136).

B. Proceedings in the Courts Below.

On July 7, 1977, the Mescalero Apache Tribe filed an action for declaratory and injunctive relief alleging, *inter alia*, that enforcement of the hunting and fishing laws of the State of New Mexico against hunters and anglers on the Mescalero Apache Reservation, either while they are on the reservation or after they have departed from the reservation, infringes on tribal sovereignty, conflicts with the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979, and with certain other specific federal constitutional and statutory provisions. The complaint urged the District Court to declare that jurisdiction to regulate hunting and fishing on the reservation is vested in the Tribe and the United States to the complete exclusion of the State of New Mexico.

The District Court determined that the Mescalero Apache Tribe has an inherent right to control hunting and fishing within tribal territory, a right which had been neither abrogated nor surrendered. The District Court found that this right to control rested exclusively with the United States and the Mescalero Apache Tribe because, although Congress could relinquish this authority to the several states, the Court found no federal legislation conferring upon the State of New Mexico authority to regulate on the Mescalero Apache Reservation. The District Court also concluded that the federally-approved game and fish ordinances of the Mescalero Apache Tribe and its federally-supported game and fish program on the Reservation constituted an "integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation." Appendix at 52a. The District Court enjoined the State of New Mexico from enforcing its hunting and fishing laws "against any

person either on the reservation or after they [sic] have left the reservation for acts done in the reservation." Appendix at 36a.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, holding that the Mescalero Apache Tribe had "inherent authority" over wildlife within the Reservation that preempted the application of state game and fish laws to any person within its tribal territory; that the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation; and that application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringed on tribal self-government.

The State of New Mexico filed a petition for writ of certiorari in the Supreme Court of the United States on November 12, 1980, seeking review of the Tenth Circuit's decision. On April 6, 1981, this Court granted the petition, vacated the judgment of the Tenth Circuit, remanded the case to that Court for further consideration in light of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), and awarded costs against the Mescalero Apache Tribe.

On remand, the Tenth Circuit accepted supplemental briefs from the parties, and, on April 26, 1982, entered a decision which reinstated its original opinion and reiterated its conclusion that any state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the Tribe's "broad power" to control "tribal resources" within the reservation, and thus would infringe on the tribe's inherent sovereignty.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Tenth Circuit on Remand Ignores This Court's Instruction to Reconsider the Case in Light of *Montana v. United States.*

On April 6, 1981, this Court granted the petition for a writ of certiorari, vacated the decision of the Tenth Circuit and remanded the case ". . . for further consideration in light of *Montana v. United States*, 450 U.S. 544 (1981)." 450 U.S. 1036 (1981).

On remand, contrary to this Court's instruction, the Tenth Circuit simply reinstated its previous decision and dismissed this Court's opinion in *Montana v. United States* as irrelevant to the resolution of this case. The Tenth Circuit sought to distinguish this case from the *Montana* case by making the superficial observation that *Montana* dealt with the power of an Indian tribe "to regulate fishing and hunting by non-Indians on lands within its reservation *owned in fee simple by non-Indians*," while this case involves the power of a state to regulate non-Indian hunting and fishing on reservation trust lands. Appendix at 6a.

The Tenth Circuit thus failed to recognize and apply the underlying principles enunciated in *Montana*. In addition, the court below failed to address the fact that the Ninth Circuit's holding that the State of Montana has concurrent authority with the Crow Tribe to regulate nonmembers hunting and fishing on the reservation, a holding squarely on point with this case, was not contested on appeal and was left standing by this Court. The Tenth Circuit thereby totally ignored this Court's clear instruction on remand.

In *Montana v. United States*, this Court considered issues regarding the limits of Indian tribes' inherent sovereignty. The Court stated that Indian tribes retain the inherent power over relations among members of a tribe but that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control

internal relations is inconsistent with the dependent status of the tribes" and cannot survive absent an express congressional delegation. 450 U.S. at 564. See *United States v. Wheeler*, 435 U.S. 313 (1978).

Hence, in discussing its decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court in *Montana* declared that

> ...The principles on which... [Oliphant] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe.

Montana v. United States, 450 U.S. at 565. This "general proposition" is applicable without exception to all lands within an Indian reservation, including both non-Indian fee lands and Indian trust lands. See *Oliphant v. Suquamish Indian Tribe*. Thus, contrary to the Tenth Circuit's superficial observation, the factual difference between the *Montana* case and this case is completely inconsequential.

The original decision of the Tenth Circuit failed to apply this "general proposition" to the instant case and thus occasioned its remand. Indeed, the Court below actually inverted this general principle and began its analysis with the presumption of exclusive tribal sovereignty: "The sovereign powers of the tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage." Appendix at 16a. In so doing, the Court below, in contrast to the *Montana* decision, declared exclusive inherent tribal sovereignty over nontribal members within the reservation to be the rule rather than the exception.

To be sure, this Court in *Montana* recognized that there are some instances in which Indian tribes retain inherent sovereign authority to regulate the activities of nonmembers on the reservations, specifically, activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealings, and

conduct by a nonmember that threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe. However, even in those instances when a tribe is found to have inherent authority to regulate nonmember activity, the court did not suggest that such authority is exclusive. In this case, the Tenth Circuit left no room for an examination of whether tribal authority extends to non-Indian hunting and fishing on the Mescalero Apache reservation and, if so, whether it is exclusive of state regulatory authority.

Instead of applying the principles articulated by the Court in *Montana* to this case on remand, the Tenth Circuit elected to reconsider its decision in light of *Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 71 L.Ed.2d 21 (1982), stating that, "in contrast to *Montana v. United States*, but like *Merrion v. Jicarilla*," the present proceeding "deals with the broad power of the Tribe to control, exploit and regulate tribal resources on tribal lands." Appendix at 6a.

Contrary to the Tenth Circuit's opinion, it is the *Merrion* case, not the *Montana* decision, that is irrelevant to the resolution of this case. The *Merrion* case did not involve the question of State authority to tax or regulate non-Indian activity within an Indian reservation. Instead, *Merrion* involved only the question of tribal authority to impose a severance tax on oil and gas removed from the Jicarilla Apache Reservation. The implications, if any, that such tribal taxing authority may have with respect to concurrent State taxing or regulatory authority was not discussed, much less resolved, in the *Merrion* decision.[3] Moreover, contrary to the Tenth Circuit's view, the instant case does not deal with "the broad power of the tribe to control, exploit and regulate tribal resources on tribal

[3] Indeed, this Court expressly acknowledged that the authority of the State of New Mexico to tax non-Indian oil and gas production within the Jicarilla Apache Reservation was not considered in any respect in the *Merrion* case. *Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 71 L.Ed. 2d 21, 38 n.17.

lands." There simply is no dispute in this case concerning the authority of the Mescalero Apache Tribe ". . . to control, exploit and regulate" the taking of fish and game on Indian trust lands within the Mescalero Apache Reservation by either members or nonmembers of the Tribe. The issue presented is whether the State of New Mexico's concurrent authority over nonmembers has been preempted by federal law or whether state regulation would interfere with the regulatory efforts of the Tribe. Those issues were addressed by this Court in *Montana*, not in *Merrion*. The Tenth Circuit has simply ignored the instructions of this Court to reconsider this case in light of *Montana v. United States*.

II. The Decisions of the Court Below Conflict with Decisions of the Eighth and Ninth Circuits and with Rulings of Other Courts on a Recurring Issue of Importance to Many States.

The decision of the Tenth Circuit on remand reinstated its previous holding that New Mexico conservation laws relating to the taking of wildlife by nontribal members on the Mescalero Apache Reservation are preempted by federal law and also unlawfully infringe upon the right of reservation Indians "to make their own laws and be ruled by them." This holding of the Tenth Circuit is in square conflict on both the federal preemption question and the *Williams v. Lee* infringement question with the recent holding of the Eighth Circuit in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805 (filed May 14, 1982) and with the decisions of the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (1981) and *United States v. State of Montana*, 604 F.2d 1162 (1979), reversed on other grounds, *Montana v. United States*, 450 U.S. 544 (1981).

In addition to the above-mentioned cases, state authority to regulate hunting and fishing by nontribal members on an Indian reservation has been upheld in a number of other cases. *United States v. Sanford*, 547 F.2d

1085 (9th Cir. 1976); *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969 (S.D. Ca. 1977), *reversed on other grounds*, 595 F.2d 1153 (9th Cir. 1979); *State of Montana ex rel. Nepstad v. Danielson*, 149 Mo. 438, 427 P.2d 689 (1967); and *Ex Parte Crosby*, 38 Nev. 389, 149 P.989 (1915).[1] Contra, *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 446 U.S. 960 (1980).

In addition, in direct contrast to the rulings of the Tenth Circuit in the instant case, such federal enactments as the Indian Reorganization Act, 25 U.S.C. § 476, Public Law 280, 18 U.S.C. § 1162(b), and the Federal Trespass Law, 18 U.S.C. § 1164, have been held not to be preemptive of state wildlife conservation laws insofar as such laws apply to nontribal members. *E.g., White Mountain Apache Tribe v. Arizona*, 649 F.2d at 1279-1281.

Petitioner submits that the question of applicability of state wildlife conservation laws to nontribal members is indeed an important question of state-tribal jurisdiction, that it is a recurring question, and that a square conflict exists between holdings in the Tenth Circuit on the one hand and holdings in the Eighth and Ninth Circuits and other courts.

III. The Tenth Circuit's Finding of Preemption and Infringement on Tribal Self-Government Would Effectively Oust State Power Over Numerous Non-Indian Activities on Reservations and Would Significantly Expand the Exclusionary Effect of *Williams v. Lee*.

The Tenth Circuit's original opinion, now reinstated, while asserting that the applicability of state regulation within a reservation depends upon whether the subject

[1] The Solicitor of the Department of the Interior in 1971 issued a formal opinion advising that nontribal members are subject to state game laws on an Indian reservation. 78 I.D. 101 (1971). During 1976 the Solicitor's Opinion was withdrawn without explanation.

matter has been preempted by federal law or whether state regulation infringes on tribal self-government, the test reaffirmed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), actually proceeds on an entirely different course. Appendix at 15a-16a. Instead of applying the proper two-prong test, the Tenth Circuit's analysis proceeds from the premise of tribal sovereignty. The Court invokes treaties and statutes as evidence of the tribe's inherent sovereignty, thus ignoring the call in *Bracker* to undertake a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145.

Petitioners submit that the Tenth Circuit's analysis in this case assumes what is to be proved and gives no weight whatsoever to the strong state interest in regulating its wildlife resource. In addition, the decision of the court below conflicts with decisions of this Court, other Circuit Court decisions and decisions of the Tenth Circuit itself in the specific findings of preemption and infringement on tribal self-government. If the court's analysis is allowed to stand, proceeding as it does from a presumption of tribal sovereignty, petitioners submit that state power over many non-Indian activities on reservations would be ousted, thereby significantly expanding the exclusionary effect of *Williams v. Lee*, 358 U.S. 217 (1959).

A. Federal Preemption.

In its reinstated opinion, the Tenth Circuit determined that application of state game laws to non-Indians hunting or fishing on the Mescalero Apache Reservation has been preempted by (1) the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979; (2) the Enabling Act for New Mexico, 36 Stat. 557 (1910); (3) the Indian Reorganization Act of 1934, 25 U.S.C. § 476; (4) the tribal constitution and ordinances enacted pursuant to the Indian Reorganization Act; (5) federal developmental assistance; and (6) Public Law 280, 67 Stat.

588 (1953). Appendix at 21a-25a. For the reasons that follow, petitioners contend that state law has not been preempted by the relevant treaties or statutes.

(1) *Treaty of July 1, 1852.* By emphasizing particular words in Articles 1 and 9 of the Treaty of July 1, 1852, the Tenth Circuit found the Treaty to be an "expression of federal dominance on the reservation" which completely preempted the application of state law even to non-Indians on the Reservation.[5]

The full text of these provisions, Appendix at 54a, does not, however, sustain the interpretation of the court below. Read in full, these treaty provisions mean only that the tribe and its members recognized the sovereignty of the United States against which they had previously waged war, and that the United States would, in turn, provide a place for the tribe to live. The meaning and significance accorded these treaty stipulations by the court below is not only at variance with the full text, it is also inconsistent with another decision of the Tenth Circuit, *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), *reh. denied*, 102 S.Ct. 1296 (1982), and with the Ninth Circuit decision in *United States v. Montana*, 604 F.2d 1162. In *Mescalero Apache Tribe v. O'Cheskey*, the Treaty of July 1, 1852, was not deemed to preempt application of New Mexico's gross receipts tax to non-Indians doing business with the tribe on the reservation. The court in *O'Cheskey* stated:

> [The Treaty] was an agreement entered into with *some* Apaches, including some Mescaleros, and was ratified by Congress .... It was a treaty of 'peace and friendship.' As this was all it

[5] The Court emphasized the words "exclusively" in Article 1 and "United States" in Article 9 and thereby concluded that the Treaty created for all time an exclusive federal enclave for the Mescalero Apache Tribe in which the game and fish laws of New Mexico would never apply to any one under any circumstances.

> purported to be, it established no rights generally for either party nor any rights in land. See *Choate v. Trapp*, 224 U.S. 665 .... The Mescaleros were then under the complete sovereignty of the United States. The Treaty thus does not appear to be of any significance as to our problem.

625 F.2d at 971. The court below failed to explain why the so-called "federal dominance" expressed in the Treaty preempts state game and fish laws in this case but did not preempt gross receipts tax laws in the *O'Cheskey* case. In *United States v. Montana*, the Ninth Circuit dealt with the Treaty of 1851 with the Crow Tribe, which contains provisions similar to those involved here, and did not deem that treaty to preempt application of state laws to non-Indians hunting and fishing on the Crow Reservation.

(2) *The New Mexico Enabling Act.* The court below concluded that the Enabling Act for New Mexico, 36 Stat. 557 (1910), which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States," taken in conjunction with the "exclusivity" language of the Treaty of July 1, 1852, preempts state law: "In the area of resource management, the treaty language in this case suggests the 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a.

As the foregoing discussion indicates, there simply is no "exclusivity" language in the Treaty of July 1, 1852. Moreover, the decision of the court below is contrary to this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1961), to the Ninth Circuit's decision in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, and the Tenth Circuit's own decisions in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, and *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979).

In *Organized Village of Kake*, this Court interpreted section 4 of the Alaska Statehood Act in which the state disclaimed all right to and the United States retained "absolute jurisdiction and control" over, *inter alia*, lands

and property held by Indians. After an extensive review of case law and legislative history, this Court concluded that:

> [T]he words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property" (including fishing rights). "Absolute" in Section 4 carries the gloss of its predecessor statutes meaning undiminished not exclusive.

369 U.S. at 71. Also in direct conflict with the decision of the Tenth Circuit is *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, in which the Ninth Circuit held that the Arizona Enabling Act, which is identical in this regard to New Mexico's, forced Arizona to disclaim only its proprietary interest in Indian land, not its governmental or regulatory authority over that land. Thus, the Court in that case concluded:

> . . . Arizona's disclaimer does not preclude it from imposing a license fee on non-Indians hunting and fishing on a reservation, even though such a fee is related to reservation realty. A state license fee is not a property tax or a tax on a tribe's own license income; the fee is paid by "nonmembers of the Tribes," *id.*, and has only an indirect effect on the tribal treasury.

649 F.2d at 1280.

In *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, the Tenth Circuit itself actually rejected the notion that the New Mexico Enabling Act established Indian reservations as exclusive federal jurisdictional enclaves. In *Jicarilla Apache Tribe*, the Tenth Circuit stated:

> By 1910, the date of the enactment of New Mexico's Enabling Act, both the Congress and the United States Supreme Court had established a procedure whereby Indian Reservations might be created as exclusive federal enclaves within states and territories similar to military

> reservations created under the Arsenals and Dockyards Clause (U.S. Const. Art. I, § 8, Cl. 17). This procedure was followed exclusively only with respect to the Kansas Indians. A different procedure was followed with respect to the grant of New Mexico's statehood. In any event, today there is no exclusive federal jurisdictional Indian Reservation in the United States.

601 F.2d at 1129. The Tenth Circuit's decision in the instant case therefore departs from previous decisions of this Court, the Ninth Circuit, and of the Tenth Circuit itself.

(3) *Indian Reorganization Act of 1934.* The Tenth Circuit also inferred preemption of state authority over non-Indian hunting and fishing from the language of the Indian Reorganization Act of 1934 which "reconfirms" in Indian tribes organizing under the Act "all powers vested in any Indian tribe . . . by existing law." The court below reasoned that tribal power over reservation hunting and fishing was "unquestionably vested" prior to 1934, and thus its "reconfirmation" in the Indian Reorganization Act gave the Act itself preemptive effect. The court further observed that tribal ordinances regarding hunting and fishing on the reservation enacted pursuant to the Indian Reorganization Act may themselves serve to preempt state law on the reservation.

The lower court's conclusions in this regard are contrary to this Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); the Ninth Circuit's decisions in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *United States v. Montana*, 604 F.2d 1162, and *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), and the decision of the U.S. District Court for the Southern District of California in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

With respect to the effect of the Indian Reorganization Act of 1934, this Court in *Oliphant v. Suquamish Tribe* has said:

> Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and punish non-Indians through the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302. Neither Act, however, addresses, let alone "confirms", tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law."

435 U.S. at 196, n.6. Thus, whatever powers the Mescalero Apache Tribe may have "by existing law" with respect to regulating hunting and fishing on the Reservation,[6] this Court has determined that the Indian Reorganization Act neither confirms such powers nor do such powers somehow infuse the Act with preemptive effect with respect to the applicability of state law to non-Indians on Indian land. Moreover, in *White Mountain Apache Tribe v. Arizona*, and *United States v. Montana*, the Ninth Circuit clearly rejected the notion that the Indian Reorganization Act delegated to Indian tribes the "far-reaching authority" to preempt state game and fish laws otherwise applicable to non-Indians by the adoption of either general tribal wildlife codes or specific regulations related to a tribal hunting and fishing business enterprise.

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[6] Apart from its power as a landowner to exclude non-Indians from the Reservation or to place conditions on their entry onto the Reservation, an Indian Tribe may enforce police regulations only against its own members. See *United States v. Wheeler*, 435 U.S. 313; *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

(4) *Federal Development Assistance.* The court below also found preemption of state law in the federal assistance provided to the Mescalero Apache Tribe by the Department of the Interior in the development of a tribal hunting and fishing business enterprise. This conclusion on the part of the court likewise conflicts with decisions of this Court and with at least one other decision of the Tenth Circuit itself.

The federal assistance which the court below considered to be preemptive of state law was a donation of elk, fish stocking of reservation lakes, technical assistance on fish management, and aerial surveys and animal pellet studies by a Bureau of Indian Affairs range conservationist to assess wildlife populations.

The finding of the Tenth Circuit that occasional federal assistance to the tribe such as this preempts the application of state law to non-Indian hunters and anglers on the Reservation is wholly inconsistent with the preemption standard expressed by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136. In *Bracker*, this Court declared that congressional enactments and comprehensive implementing regulations establishing pervasive federal regulatory scheme (as opposed to merely federal material and technical assistance) must be involved in order to oust state law from application on an Indian reservation. Indeed, as explained in *Bracker:*

> Our decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Company v. Arizona Tax Commission, supra*, leaves no room for the additional burdens sought to be imposed by state laws.

448 U.S. at 151, n.15.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), federal involvement in an Indian commercial enterprise was found not to preempt the application of

state law to the tribal activity. In that case, the Bureau of Indian Affairs had conducted a feasibility study, equipment and construction money had been provided by a loan from the federal government, and the necessary land was supplied by the United States Forest Service on a long-term lease to the tribe. The degree of federal activity in the instant case falls below that involved in the *Jones* case. And, in *White Mountain Apache Tribe v. Arizona*, the Ninth Circuit declined to find preemption of state regulation from virtually identical federal involvement in the White Mountain Apache hunting and fishing enterprise as that involved in this case.

Moreover, the Tenth Circuit itself acknowledged, in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, that federal participation and interest in a particular Indian enterprise does not alone preempt state law from application to *non-Indians* involved in the venture. In that case, the Tenth Circuit stated:

> Finally, the extent of the federal government's role in this area, as a measure of federal interest in Indian affairs, is significant. Federal participation and interest in this particular business venture is extensive, but that alone is not enough to immunize these contractors from state taxation.

625 F.2d at 974 (concurring opinion). The decision of the court below that the measure of federal assistance involved in this case preempts state law cannot be squared with decisions of this Court, rulings of other circuits or with other decisions of the Tenth Circuit itself.

(5) *Public Law 280.* Finally, the Court of Appeals determined that federal preemption resulted from "the negative inferences from Public Law 280." Appendix at 21a. The court reasoned that because Public Law 280, 18

U.S.C. § 1162 (b),[7] protects previously conferred or "traditional" Indian hunting and fishing rights from being hindered even in those states which accept Public Law 280 jurisdiction, a non-Public Law 280 state like New Mexico may not, *a fortiori*, hinder such rights.

This conclusion, of necessity, is based on the Tenth Circuit's previous assumption that the Treaty of July 1, 1852, afforded "traditional hunting and fishing rights" to the Mescalero Apache Tribe on the basis that it did not expressly withdraw them. This interpretation of the Treaty of July 1, 1852, was, in turn, a reflection of the Court's misperception of the significance of "inherent" tribal sovereignty. In fact, the Treaty of July 1, 1852, afforded no such rights to the Mescalero Apache Tribe, particularly insofar as non-Indians are concerned, and thus Public Law 280 would not prohibit New Mexico, even if it were a Public Law 280 State, from exercising the authority it seeks to exercise in this case.

This holding of the court below stands in conflict with the Ninth Circuit decision in *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253, where the court interpreted Public Law 280 to preserve rights and immunities granted to an Indian tribe but not to extend such rights or immunities to non-Indians undertaking activity on a reservation. Accordingly, Public Law 280 did not prevent the imposition of a state possessory interest tax on a non-Indian lessee of reservation land.[8] If Public Law 280 does

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[7] The Court of Appeals referred to the following proviso in Public Law 280:

> Nothing in this section . . . shall deprive any Indian or Indian tribe . . . of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing or regulation thereof.

[8] On the same reasoning, state fish and game laws were held applicable to non-Indians on an Indian reservation in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

not directly preempt state law from application to non-Indians on Indian land, it surely does not do so by "negative inferences."

The decision of the court below thus introduces wide variation among the circuits not only as to the preemptive force of particular enactments by Congress and treaty provisions but also as to the gauge to be used in the measurement. The divergent results in the lower courts on these important jurisdictional issues cannot be brought to rest by ambiguous formulas; neither do the problems created improve with age. This Court should provide guidance.

B. Tribal Self Government.

In its opinion on remand, the Tenth Circuit also confirmed its previous ruling that application of New Mexico game and fish laws to non-Indians on the Mescalero Apache Reservation would infringe on the right of the tribe to govern itself. This conclusion stems from the Tenth Circuit's persistent view that state regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation would interfere with tribal efforts "to control, exploit, and regulate tribal resources" for tribal economic gain. Appendix at 6a. Specifically, the court below perceived that state regulation would (1) financially impair the tribe's hunting and fishing business enterprise; (2) interfere with the tribal regulatory program over its "reservation's resources;" and (3) deny the tribe an opportunity to develop its own system of wildlife management. Appendix at 26a-28a.

There is simply no factual foundation for the Tenth Circuit's position. Indeed, the facts of record refute the Court's conclusions.[9] That aside, however, the Court's conclusion of infringement goes well beyond the notion of preserving tribal autonomy over the internal affairs of its members, and radically departs from decisions of this Court and other federal courts on the specific bases for the

[9] See Statement of the Case, *supra*.

infringement finding. On the question of financial impairment of the tribe's commercial activity, for example, the decision below is at odds with the decisions of this Court in *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Thomas v. Gay*, 169 U.S. 264 (1898); and with decisions of other circuits in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805; *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253; and with the decision of the Tenth Circuit itself in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967. Contrary to the Tenth Circuit's view, these cases hold that imposition of a non-discriminatory tax or regulatory system on non-Indians doing business with an Indian tribe is permissible even if it results in an economic burden on the tribe. *Moe v. Confederated Salish and Kootenai Tribe*, 425 U.S. 463 (1976).

With respect to the Tenth Circuit's holding that state regulation would interfere with the tribal regulatory program and would deny the tribe an opportunity to develop a system of wildlife management, the court below has reached a result which directly conflicts with those of the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *United States v. Montana*, 604 F.2d 1162; and *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253; and with the decision reached by the Eighth Circuit in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805, as well as with the ruling of the Court in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

Those cases recognize that non-discriminatory, state regulation against only non-Indians on Indian land does not deprive a tribe of its right to impose its own regulatory measures or to adopt its own conservation practices. These options remaining open to the tribe, tribal self-government is not impeded. The Tenth Circuit's conclusion to the contrary stands alone.

C. State Interests.

New Mexico plainly has a legitimate interest in preserving and regulating the exploitation by non-Indians of the wildlife resources of the state which range on and off the Reservation. As stated by the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1283 (1981):

> States have an obvious interest in conserving animals which, if protected, would move off reservations onto state lands; moreover, states have an interest in animals that migrate from state lands where they survive by virtue of the States' conservation efforts, onto reservations.

The holding of the court below, starting as it does from the premise of territorial sovereignty in the tribe, provides no analytical framework in which to weigh the legitimate interests of the state.

The Mescalero Apache Reservation is one of twenty-six Indian reservations and pueblos located within the State of New Mexico. These twenty-six Indian enclaves comprise 7,348,563 acres or 11,482 square miles. Each of these other Indian enclaves in New Mexico could become a haven for non-Indian activity free of State law on the model of the Mescalero Apache enterprise. Efficient, effectual statewide game management would be impossible under these circumstances.

On a larger scale, if the decision below stands, Indian tribes all over the country may adopt the Mescalero model featuring tribal operation of a commercial hunting and fishing enterprise in an attempt to free their virtually exclusive non-Indian patronage from the requirements of state law and to avail themselves of the accompanying competitive advantages. Indeed, this type of enterprise is already spreading. See *State of Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134; *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir.

1978), petition for writ of certiorari voluntarily dismissed, 442 U.S. 939 (1980); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981). Moreover, the Mescalero model is now being used with respect to other Indian enterprises such as the operation of gambling and liquor facilities in an effort to immunize non-Indian patrons from state law for the commercial advantage of the Indian tribe. See, for example, *United States v. State of New Mexico*, 590 F.2d 323 (10th Cir. 1978); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1717 (1982); *Rehner v. Rice*, No. 77-2409 (9th Cir. filed June 8, 1982).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEFF BINGAMAN
Attorney General of
New Mexico

THOMAS L. DUNIGAN
Deputy Attorney General

P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 982-6993

Attorneys for Petitioners

Of Counsel:

PAUL A. LENZINI
TARA HARVEY
CHAPMAN, DUFF AND PAUL
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-8800

Dated: August 25, 1982

IN THE

Supreme Court of the United States

No. A-1125

NEW MEXICO and HAROLD F. OLSON, Etc.,
Petitioners

v.

MESCALERO APACHE TRIBE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 25, 1982.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 25th day of June, 1982.

United States Court of Appeals
For the Tenth Circuit

MARCH TERM—April 26, 1982

Before Honorable William E. Doyle, Honorable Jean C. Breitenstein, and Honorable Monroe G. McKay, Circuit Judges

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Judgment
No. 78-1790
(D.C. No. 77-395-M)

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

v.

STATE OF NEW MEXICO and WILLIAM S. HUEY,
Individually and as Director of
New Mexico Department of Game and Fish,
or his Successors in Office,
Defendants-Appellants.

INTERNATIONAL ASSOCIATION OF FISH AND
WILDLIFE AGENCIES,
UNITED STATES OF AMERICA,
JICARILLA APACHE TRIBE, STATE OF UTAH,
Amici Curiae

This matter comes on for further consideration after remand by the Supreme Court of the United States, and was briefed by the parties in light of Montana v. United States, 450 U.S. ___ (1981).

Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of New Mexico and the judgment of this Court in the captioned cause are affirmed.

The judgment of this Court, ordered vacated on May 12, 1981, and the opinion filed August 13, 1980, are ordered reinstated.

As ordered by the Supreme Court, the petitioners New Mexico, et al, recover from Mescalero Apache Tribe the sum of $200.00 for Clerk's costs in that court.

/S/ HOWARD K. PHILLIPS

Howard K. Phillips, Clerk

PUBLISH

United States Court of Appeals

TENTH CIRCUIT

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

vs.

No. 78-1790

STATE OF NEW MEXICO and
HAROLD F. OLSON, individually
and as Director of the New
Mexico Department of Game and
Fish, or his successors in office,
Defendants-Appellants.

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. Civil Case No. 77-395-M)

On the Briefs:

Jeff Bingaman, Attorney General; Thomas L. Dunigan, Deputy Attorney General; Thomas Patrick Whelan, Jr., Assistant Attorney General, Santa Fe, New Mexico, for Defendants-Appellants.

George E. Fettinger and Kim Jerome Gottschalk of Fettinger & Bloom, Alamogordo, New Mexico, for Plaintiff-Appellee.

Carol E. Dinkins, Assistant Attorney General; Robert L. Klarquist and Edward J. Shawaker, Department of Justice, Washington, D.C. for the United States as amicus curiae.

B. Reid Haltom and Marcia L. Green of Nordhaus, Haltom & Taylor, Albuquerque, New Mexico, for the Jicarilla Apache Tribe as amicus curiae.

Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges.

McKAY, Circuit Judge.

In *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724 (10th Cir. 1980), this court affirmed an order of the district court enjoining the State of New Mexico from enforcing its game laws against non-Indians who hunt and fish within the boundaries of the Mescalero Apache Indian Reservation. Subsequently the United States Supreme Court granted the State's petition for a writ of certiorari, vacated this court's judgment, and remanded the case for further consideration by this court in light of *Montana v. United States*, 450 U.S. 544 (1981).

While this court was considering *Mescalero v. New Mexico* on remand, the Supreme Court decided *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982), in which the Court affirmed the authority of an Indian tribe to impose a severance tax on non-Indian mining activities on the Tribe's reservation. In *Merrion* the Court held that "the Tribe's authority to tax non-Indians who conduct business on the reservation ... is an inherent power necessary to tribal self-government and territorial management." 102 S.Ct. at 903. In the Court's opinion, that authority "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," as well as from the tribe's authority to exclude non-Indians from tribal land. *Id.* at 901. The Court's decision in *Merrion v. Jicarilla* convinces us that *Montana v. United States* does not dictate a result different from that originally reached by this court in *Mescalero v. New Mexico*.

Montana v. United States deals with "the sources and scope of the power of [the Crow] Indian [T]ribe to regulate fishing and hunting by non-Indians on lands within its reservation *owned in fee simple by non-Indians.*" 450 U.S. at 547 (emphasis added). *Mescalero v. New Mexico*, however, involves the question of whether a state has the authority to regulate non-Indian hunting on Indian-owned land within a reservation.[1] In contrast to *Montana v. United States*, but like *Merrion v. Jicarilla*, the case before us deals with the broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands.

In both *Montana v. United States* and *Merrion v. Jicarilla*, the Supreme Court reiterated that Indian tribes retain inherent sovereignty over their own reservations in matters concerning self-government and internal relations. 102 S.Ct. at 901; 450 U.S. at 565-66. In the case before us, the Mescalero Apache Tribe has carefully built up and managed the wildlife on its reservation without the aid of the state and is seeking to manage its resources for economic return. There is no evidence that the state supplies any management services on the reservation where the hunting takes place. Under these circumstances, we are convinced that the Tribe's inherent sovereignty permits it to determine how its reservation's resources shall best be regulated. Dual regulation of the use of these resources would interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation. The state, therefore, cannot interfere by attempting to control non-Indian hunting and fishing conducted exclusively on reservation land held by the Tribe any more than it could do so if the activities in question took place in one of New Mexico's neighboring states.

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[1] Unlike the Crow Reservation, where only approximately 17% of the land is now held in trust for the Tribe, and 28% is held in fee by non-Indians, the Mescalero Apache Reservation contains 460,000 acres belonging to the Tribe, but only a negligible 180-85 acres that are held in fee by non-Indians.

It is clear to this court that the principles enunciated in *Merrion*, rather than those enunciated in *Montana v. United States* govern and confirm our prior decision. Therefore, the judgment of the district court is affirmed, and the previous decision of this court is ordered reinstated.

United States Court of Appeals

FOR THE TENTH CIRCUIT

JULY TERM—August 13, 1980

Before Honorable William E. Doyle, Honorable Jean S. Breitenstein, and Honorable Monroe G. McKay, Circuit Judges

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,
vs.
STATE OF NEW MEXICO and WILLIAM S. HUEY, Individually and as Director of New Mexico Department of Game and Fish, or his Successors in Office,
Defendants-Appellants,
INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES, UNITED STATES OF AMERICA, JICARILLA APACHE TRIBE, STATE OF UTAH,
Amici Curiae.

JUDGMENT
No. 78-1790
(D.C. No. 77-395-M)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. Judge Breitenstein concurs.

Test .....

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PUBLISH

United States Court of Appeals

TENTH CIRCUIT

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

v. No. 78-1790

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of New Mexico
Department of Game and Fish,
or his Successors in Office,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. Civil Case No. 77-395-M)

Jeff Bingaman, Attorney General, and Thomas L. Dunigan, Deputy Attorney General (Thomas Patrick Whelan, Jr., Assistant Attorney General, with them on the briefs), Santa Fe, New Mexico, for Defendants-Appellants.

George E. Fettinger (Kim Jerome Gottschalk with him on the brief), Fettinger & Bloom, Alamogordo, New Mexico, for Plaintiff-Appellee.

Steven E. Carroll, Attorney (James W. Moorman, Assistant Attorney General; Robert L. Klarquist and Edward J. Shawaker, Attorneys, on the brief), Department of Justice, Washington, D.C., for the United States as amicus curiae.

Paul A. Lenzini and Susan A. Goltz, Attorneys, Chapman, Duff and Paul, Washington, D.C., filed an amicus curiae brief for the International Association of Fish and Wildlife Agencies.

Daniel H. Israel, Native American Rights Fund, Boulder, Colorado; Robert Nordhaus and Adelia W. Kearny, Nordhaus, Moses & Dunn, Albuquerque, New Mexico, filed an amicus curiae brief for the Jicarilla Apache Tribe.

Robert B. Hansen, Utah Attorney General; Richard L. Dewsnup, Assistant Attorney General; and Dallin W. Jensen, Assistant Attorney General, filed an amicus curiae brief for the state of Utah.

Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges

McKAY, Circuit Judge.

This case involves a challenge to the State of New Mexico's attempt to regulate the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache reservation. The Tribe carried its challenge to the district court where it secured a judgment declaring that the State may not apply its hunting and fishing laws to any person, Indian or non-Indian, within the boundaries of the tribal reservation. The court also enjoined the State from enforcing its game laws "against any person either on the Reservation or after they [*sic*] have left the Reservation for acts done on the Reservation." Record vol. 1, at 221. The State concedes its lack of jurisdiction over tribal members on the reservation, but appeals the district court's resolution as to non-members of the Tribe.[1]

[1] For most purposes, the important distinction is between tribal members and non-members, not between Indians and non-Indians. Members of other tribes generally visit the Mescalero reservation on the same footing as non-Indians. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4675 (1980).

In 1977 the Tribe, as part of "an extensive tourism program designed to bring income and employment to the Reservation,"[2] Record, vol. 1, at 205, adopted various hunting and fishing ordinances to improve management of reservation wildlife resources. These ordinances were adopted pursuant to the tribal constitution and were duly approved by the Secretary of the Interior. Some of the ordinances are clearly inconsistent with state laws.[3] For example, the Tribe specifically does not require that a hunter on its reservation purchase a state license and, in contrast to state law, the Tribe permits elk and antelope hunters to purchase permits in consecutive years. In addition, tribal hunting seasons do not all correspond with those of the State, and bag limits differ. By obeying the more restrictive of the regulations, a non-member hunter on the reservation could conform his behavior to the dictates of both Tribe and State. His doing so, however, would render much of the tribal regulatory scheme a nullity.

The revenue derived directly and indirectly[4] from visiting sportsmen comprises a significant portion of the tribal budget, but reservation hunting and fishing by non-members is but a minuscule part of the overall state

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[2] The parties stipulated that "[t]he purpose of the tourism program is to provide income for the Mescalero Apache Tribe which may be used for its governmental purposes and economic development." Record, vol. 1, at 121-22.

[3] The Tribe may be seeking to create jurisdictional disputes. However, no negative inference should be attached to such a posture. In fact, a clear intent to preempt state jurisdiction is an element in the Tribe's favor. *See* Confederated Tribes of the Colville Indian Reservation, 591 F.2d 89, 91 (9th Cir. 1979).

[4] The Tribe has erected a resort complex where many sportsmen stay while on the reservation. Because of the recreation facilities at the resort, many nonhunters accompany the sportsmen. In recent years direct tribal income from hunting and fishing activities has exceeded $250,000 per year. The indirect revenues increase that total. Record, vol. 1, at 135.

total.[5] Although the State argues that wildlife management *efficiency* requires its jurisdiction over reservation activities, no claim is made that any species is endangered. *Cf. Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 176-77 (1977). In fact, the State agrees that tribal management of reservation wildlife resources has been exemplary, and in conformance with accepted wildlife management procedures. Record, vol. 1, at 134. The Tribe maintains a large, well-trained enforcement staff and receives support from the Bureau of Indian Affairs.

In the factual situation presented by this case, the State is unable to claim that either it or its lands played any significant role in the creation and preservation of the reservation wildlife resources. Instead, much of the reservation wildlife is effectively a creation of the Tribe and the federal government. For example, the antelope population on the reservation is non-migratory, and few animals ever cross the boundaries. In recent years, the herd's protection has been entirely in tribal hands. Furthermore, the Tribe has taken affirmative steps to build an elk herd. Prior to 1966, only 13 elk grazed in the general area of the reservation. In 1966-67, the National Park Service donated 162 elk. Through considerable range development, the Tribe removed cattle from direct competition with the elk for grazing land. The elk herd has grown to 1200, many of which wander off the reservation during part of the year. The migratory elk thus provide significant hunting opportunities for non-members outside the reservation, and the Tribe, despite its fundamental role in herd development, makes no attempt to limit that hunting.

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[5] For example, in a recent year the Tribe sold 50 elk licenses, while the state sold 14,000. Ten tribal antelope licenses were available, compared to 3500 for the state. Tribal deer licenses permitted the taking of 500 deer; the State issued 100,000 licenses.

The reservation has no natural lakes. Several man-made lakes have been constructed with federal funds and are stocked from a national fish hatchery on the reservation. Federal officials from the hatchery also provide the Tribe with technical assistance. The State has never stocked reservation lakes and no longer stocks any reservation streams. The entire tribal fishing program now exists independent of the State.

I. Justiciability

Before proceeding to the merits, we must dispose of several preliminary matters raised by the State. The State challenges, as it unsuccessfully did below, the Tribe's right to bring this suit. The State asserts that the Tribe has no standing and that the suit is otherwise not justiciable.

On the standing issue, the State argues that "[t]he Tribe is seeking to enjoin the enforcement of State penal statutes which do not apply to it and which do not threaten it or its members in any real, direct and immediate sense." Brief for Appellant at 20. In the State's view, a challenge to the state regulations may be prosecuted only by an aggrieved non-member sportsman. Since the Tribe has sold nearly all of its available hunting and fishing permits,[6] the Tribe has allegedly suffered no revenue losses and no other "injury in fact" by the regulations the State would impose on non-member sportsmen.

The State's understanding of standing requirements is overly narrow. For purposes of standing, federal courts

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[6] In the first year that tribal antelope licenses were available, only six of ten were sold. The Tribe has sold all other available licenses, however, and we may safely assume that the antelope license figures reflect a temporary aberration.

may certainly consider the principles of elementary economics. The State's imposition of higher costs on individual sportmen clearly limits the Tribe's ability to raise the prices of its own licenses. *Cf. Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971). We have no reason to assume that the demand curve for reservation hunting and fishing is so inelastic that the Tribe could charge and receive any imaginable price for its licenses. Even though all tribal licenses are now sold, and applications for licenses exceed the number available, that fact merely reflects the Tribe's conservative adjustment to market forces in devising its own fee structure. Similarly, other conflicts between the tribal and state regulatory structures—*e.g.*, variations in hunting seasons—necessarily deter some non-member hunters from entering the reservation at some times. These conflicts affect the Tribe's own regulatory scheme. They also influence the prices the Tribe may charge and impinge on the Tribe's revenue-raising powers. These effects are not merely speculative, but are the straightforward and immediate results of economic forces. *Cf. United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 683-90 (1973).

Beyond economics, the Tribe has another legitimate basis for standing. When one sovereign entity is alleged to have usurped the authority lawfully belonging to another, the injured sovereign must have standing to challenge the usurpation. Other circuits have routinely found standing, without discussion, when Indian tribes have sought judgments that states were unlawfully interfering with tribal regulation of hunting and fishing. *See, e.g., Confederated Tribes of the Colville Indian Reservation v. Washington*, 591

F.2d 89 (9th Cir. 1979); *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978).[7]

No other barrier to justiciability is present. The impact of the state regulation upon the Tribe is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967). The limits of state jurisdiction on the reservation is an issue now as ripe for resolution as it will ever be. The State has made clear that prosecution of non-member violators of state game laws, with the attendant effects on tribal regulation and revenue-raising, is intended and probable. Record, vol. 1, at 204 *Cf. Poe v. Ullman*, 367 U.S. 497, 501-2 (1961).

Finally, all indispensable parties are named in the suit. As the district court noted, "A determination that New Mexico game laws are not applicable to non-Indian activity within the Mescalero Apache Reservation cannot injuriously affect the interests of the United States...." Record, vol. 1, at 204. In addition, "no act would be required of the Secretary [of the Interior] regardless of the outcome of the suit." *Id.* at 205.

II. Federal Preemption

Any attempt by a state to exercise regulatory powers within the confines of a federally recognized, "semi-independent" Indian reservation is precluded if the subject matter has been preempted by federal law or if the

[7] Since standing is in part a constitutional concept, a federal court has an obligation to consider the issue even if the parties do not raise it. The lack of discussion in these cases therefore cannot reflect only party failure to press the standing issue.

state regulations infringe on the tribe's rights of self-government. *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899 (1980). Accordingly, in this jurisdictional dispute between a state government and an Indian tribe, we must first determine whether the applicable treaty and federal statutes, read against the "backdrop" of Indian sovereignty, preempt exercises of state power. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690-91 (1965). Under a standard of construction followed from the time of the Marshall Court, we must construe the applicable treaty and statutes liberally in order to further Indian interests. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174; *Squire v. Copoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).*

The sovereign powers of the Tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage. The historical relationship between Indian tribes, their lands, and the wild game thereon has of necessity been one of great interdependence. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). After a careful, thoughtful analysis, the district court properly determined that, before the signing of the Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852), the Tribe "had

* The applicable treaty itself mandates "liberal construction . . . to the end that . . . the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Apaches, July 1, 1852, art. 11, 10 Stat. 980 (1852).

inherent and complete authority to control the fish and game found within the confines of the tribal territory." Record, vol. 1, at 208. Since the treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," *Id.* (quoting *United States v. Winans*, 198 U.S. at 381), the Tribe retains its authority even though the treaty itself did not fix the boundaries of the tribal reservation.[9] *Cf. Antoine v. Washington*, 420 U.S. 194 (1975). Abrogation of any rights protected by treaty, particularly fundamental hunting and fishing privileges, must be explicit to be effective, *see Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968), and no congressional enactment here meets that standard. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978).

The Tribe's inherent authority stems largely from the traditional reliance on wild game for basic survival needs. *See* F. Cohen, *Handbook of Federal Indian Law* 286 (1942). However, the Tribe's historical use of only some species within its territory does not mean that the game control powers reserved by treaty are less than all-encompassing. It is quite irrelevant whether the Mescalero at one time were primarily hunters, fishermen or gatherers. At the treaty's signing, the United States must certainly have understood that the Tribe could alter its use of wildlife as conditions changed. For example, "[it is] inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation." *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977).

The Tribe's sovereign powers are not, of course, limited to control of wildlife. The Tribe's historical powers

[9] The treaty mandated creation of a new tribal territory, but the actual boundaries of the reservation were set by a series of executive orders from 1873 until 1883.

extend to the territory itself. The State acknowledges that the Tribe has, at a minimum, the power of any landowner to exclude non-official persons from the reservation.[10] In the State's view, the Tribe may altogether forbid permission to hunt and fish or may condition the grant of permission upon compliance with state laws, but the Tribe may not exempt a non-member hunter from the application of state laws. The power of a landowner, however, provides only one source—and a secondary one—of tribal authority. *See Powers of Indian Tribes*, 55 Interior Dec. 14, 48-50 (1934). The Supreme Court has repeatedly stressed "that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*; they are 'a separate people' possessing 'the power of regulating their internal *and social relations*.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added) (citations omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541-43 (10th Cir. 1980); *United States v. New Mexico*, 590 F.2d 323, 327-28 (10th Cir. 1978) ("Indian nations [are] distinct political communities, having territorial boundaries in which their authority is exclusive"). In its most recent statement, the Court "emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevan to the preemption inquiry; . . . it

[10] In 1969 the Tribe informed the State that its game and fish officers would be welcome only if they obtained tribal permission to enter the reservation. The State has honored the Tribe's request, but it does not concede the Tribe's power to exclude officials. Brief for Appellants at 9-10. Because of our resolution of the case, we do not reach the issue of the State's enforcement powers on the reservation. The Supreme Court also has not spoken on this question. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4675 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 468 n.6 (1976).

remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4901 (1980).

The State questions the existence of any inherent tribal powers in this case. It argues that the Tribe could not have exclusive rights in any traditional territory because, in effect, there is no traditional territory: "the Mescaleros were being swept from their lands by a tide of white settlers." Brief for Appellants at 37. If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).

In regulating game on the reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a "significant interest." *Cf. Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4673 (1980). This case is therefore quite unlike *Colville*, in which the Court rejected tribal claims to an exemption from state taxation of reservation cigarette sales to non-members. Reservation sales outlets were, except in location, identical to their off-reservation competitors, and the product taxed was in no sense a tribal creation. Unlike the situation in this case, no significant *tribal* interest was involved.

This case is further unlike *Colville* in that here a definite conflict exists between the tribal regulatory

structure and that of the State. In *Colville* the tribal and state taxing schemes were purely revenue-raising in nature, and dual systems of pure taxation are not inherently conflicting. In contrast, dual *regulatory* schemes, as the Court implied, necessarily create mutual dislocations. 48 U.S.L.W. at 4674.[11] It is because of this characteristic of regulation that we presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction. *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 295-99 (1979). "[T]hose standards of pre-emption that have emerged in other areas of the law" generally do not apply "*to federal enactments regulating Indian tribes.*" White Mountain Apache Tribe v. *Bracker*, 48 U.S.L.W. 4897, 4899 (1980). As this court has recently emphasized, "[T]he cases stress that *regulatory* powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms."

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[11] In Mescalero Apache Tribe v. O'Cheskey, No. 77-2102 (10th Cir. June 5, 1980) (en banc), we were also not faced with dual regulatory schemes. The state tax there at issue, like the *Colville* tax, was purely revenue-raising in nature, and the Tribe had not imposed its own taxing scheme. In United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980), the Ninth Circuit upheld dual regulation of hunting and fishing on the Crow reservation. The court assumed, however, that tribal-state cooperation would be "forthcoming." 604 F.2d at 1172. Because of the Mescalero Apache Tribe's clear position in this case, we may make no such assumption. *See also* Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89, 91 (9th Cir. 1979) ("tribal government explicitly acknowledged that state jurisdiction would not constitute an obstacle to its efforts").

United States v. *New Mexico*, 590 F.2d 323,328 (10th Cir. 1978) (emphasis added).[12]

As important as sovereignty is in this case, we need not consider whether the Tribe's sovereign powers alone are sufficient to preempt state jurisdiction. The Supreme Court has not ruled on that question but has noted, given the pervasiveness of federal treaties and statutes, that it is "something of a moot question." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n.8 (1973). *See* Note, *Tribal Preemption*, 54 Wash. L. Rev. 633, 639 (1979). In this case, the treaty and statutory basis for federal preemption is strong. We see as sources of preemption (1) the treaty; (2) the Enabling Act for New Mexico; (3) the Indian Reorganization Act of 1934; (4) the tribal constitution and ordinances enacted pursuant to the IRA; (5) the extensive federal developmental assistance; and (6) the negative inferences from Public Law 280. These factors, considered in light of the Tribe's inherent powers over reservation land and wildlife, compel our conclusion of preemption.

The applicable treaty, as we have noted, implicitly reserves to the Tribe control over reservation hunting and fishing. In addition, the treaty is explicit in its expression of federal dominance on the reservation. In Article 1 of that document, the Tribe submits itself "*exclusively* [to] the laws, jurisdiction, and government of the United

[12] Insofar as other courts have improperly presumed the existence of state jurisdiction in similar cases, their decisions do not control our determination. *See, e.g.*, United States v. Montana, 604 F.2d 1162, 1172 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980). Nor does past participation by the State in reservation wildlife regulation necessarily limit any tribal claim of sovereign powers. *See* Brief for Appellant at 55. Past cooperation of the Tribe with the State reflects nothing more than a temporary waiver of the Tribe's preemptive rights in the hunting and fishing area.

States of America." Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852) (emphasis added).[13] Further, the treaty provides that the *United States* shall "designate, settle, and adjust [the Tribe's] territorial boundaries, and pass and execute ... such laws as may be deemed conducive to the prosperity and happiness of [the Mescalero Apaches]." *Id.*, art. 9, 10 Stat. 980.

The treaty's exclusivity language aids our interpretation of the Enabling Act for New Mexico, 36 Stat. 557 (1910), in which New Mexico Indian lands were placed "under the absolute jurisdiction and control of the Congress of the United States." Although *Organized Village of Kake v. Egan*, 369 U.S. 60, 68 (1962), said that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction," *Egan* "did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 176 n.15 (1973). In the area of resource management, the treaty language in this case suggests that "absolute" jurisdiction is indeed "exclusive" jurisdiction.[14]

The tribal constitution gives to the Mescalero Apache Tribal Council the power "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and

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[13] New Mexico does not challenge the validity of the treaty. The parties stipulated that it was signed by a representative of the Tribe. Record, vol. 1, at 118.

[14] The New Mexico Supreme Court has understood the implications of the *McClanahan* clarification of *Egan*. In a case involving the Mescalero Apaches, the court viewed the clarification as a refusal "to extend the concept of concurrent federal and state jurisdiction to cases which arise in areas set aside by treaty for the exclusive use and control of Indians." Chino v. Chino, 90 N.M. 204, 561 P.2d 476, 478 (1977).

to regulate the conduct of trade and the use and disposition of tribal property upon the reservation." Mescalero Apache Tribe Revised Const. art. 11, § 1(c).[15] That constitution was adopted and approved pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476, under which Congress provided that the adoption of a tribal constitution reconfirms in the tribe "all powers vested ... by existing law." The statute thus reconfirms all preexisting powers of the Tribe and itself becomes a source of preempting power. *See White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899, 4899 n.10 (1980); Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L. Rev. 1459, 1463, 1463 n.27 (1979).

Tribal power over reservation hunting and fishing was unquestionably vested prior to 1934. Tribal ordinances enacted to implement traditionally held, and congressionally approved, powers, may themselves serve to preempt the State. The Supreme Court saw another similarly enacted tribal ordinance as the implementation of "an overriding federal policy which is clearly adequate to defeat state jurisdiction." *Fisher v. District Court*, 424 U.S. 382, 390 (1976). Any constitutional limitations on congressional authority to delegate its legislative powers are "less stringent ... where [as here] the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). The tribal scheme also negates any argument that the Tribe has not manifested an intent to preempt state jurisdiction. *Cf. Confederated Tribes of the Colville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979).

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[15] The constitution also provides that "[n]o provision ... shall be construed as a limitation on the inherent residual sovereign powers of the Mescalero Apache Tribe." Mescalero Apache Tribe Revised Const. art. 27, § 1.

The Fourth Circuit has held that extensive federal participation in reservation wildlife development is itself an element indicating federal preemption. *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75, 78 (4th Cir. 1978). In *Eastern Band*, as here, the federal government and the Tribe had developed the reservation fishing program with no state assistance. Where the State plays no role in stocking reservation waters, it "has no perceivable interest in reservation fishing." *Id.*[16] *See White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4901 (1980). *See also Central Machinery Co. v. Arizona State Tax Commission*, 48 U.S.L.W. 4904 (1980).

Finally, we infer federal preemption from the statutory structure of Public Law 280, 67 Stat. 590 (1953), and its later amendments. Under that statute, New Mexico had the option until 1968 of unilaterally asserting civil and criminal jurisdiction over the Mescalero Apache reservation. It did not do so. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. at 177-79. Even had the State assumed jurisdiction, the statute in its present form specifically protects the tribes from the deprivation of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof." 25 U.S.C. § 1321(b). If those states which accepted Public Law 280 jurisdiction may not hinder traditional hunting and fishing rights, New Mexico *a fortiori* may not do so.

The presumption of federal preemption is clearly not overcome by a treaty and statutory scheme which reassert

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[16] In *Eastern Band*, Chief Judge Haynsworth emphasized that the fishing program was a "purely commercial undertaking" of the Cherokees. 588 F.2d at 79. We believe that the tribal interests are, if anything, enhanced when the purposes of the wildlife regulation are much broader.

the exclusivity of federal and tribal regulation of hunting and fishing. The State may not apply its game laws to persons for acts done on the reservation.[17]

III. Tribal Self-Government

The second test for determining the propriety of state regulation on Indian reservations analyzes the impact of the regulation on tribal self-government. Even if the treaty and statutory scheme, read against the backdrop of sovereignty, were insufficient to create federal preemption, the Tribe's authority is here protected under a tribal self-government analysis.[18]

In the landmark case of *Williams v. Lee*, 358 U.S. 217 (1959), which upheld tribal court jurisdiction over non-Indians, the Supreme Court restated the controlling test: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. To apply that test, a court must "[seek] an accomodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes of the Colville Indian*

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[17] Our analysis does not attach independent preemptive significance to 18 U.S.C. § 1165. *Cf.* Central Machinery Co. v. Arizona State Tax Commission, 48 U.S.L.W. 4904 (1980). The import of that statute is addressed in Part V.

[18] We recognize that the preemption and self-government analyses overlap, and that the Supreme Court appears to be gradually collapsing the tests into one. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4673-74 (1980). Nonetheless, the two tests continue to provide different analytical perspectives. *See* White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897, 4899 (1980).

Reservation, 48 U.S.L.W. 4668, 4674 (1980). Congress has identified one overriding federal interest by "recogniz-[ing] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a).

In the context of its analysis of the pure-taxation schemes of the tribe and state in *Colville*, the Supreme Court delineated the relevant considerations for the balancing process:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

48 U.S.L.W. at 4674. In the case before us, the scales tip decisively in the Tribe's favor.

Unlike *Colville*, we here have a clear state interference with a traditional tribal regulatory power. To restrict the application of the tribal scheme to members only would be to complicate excessively the enforcement process and to render the very idea of "regulation" an absurdity. Here the Tribe has, with the aid of the federal government, generated the "value . . . on the reservation" which it now seeks to control and whose benefits it seeks to enjoy. The state services received by on-reservation sportsmen are minimal—incidental spillover effects of state activities outside the reservation. In fact, the spillover benefits to the *State* from the tribal conservation

scheme—*e.g.*, development of the migratory elk herd—may well be more significant. Although New Mexico has a legitimate interest in the conservation of its wildlife, the Tribe's activities do not threaten that interest in any way.

The Ninth Circuit held, in *United States* v. *Sanford*, 547 F.2d 1085 (9th Cir. 1976), that Montana's elk hunting laws were applicable to non-Indians hunting on a tribal reservation. The court found no indication that Montana game laws interfered with tribal self-government. *Id.* at 1089. In distinguishing *Sanford*, the Fourth Circuit emphasized that "there was no showing in *Sanford* that the applicability of Montana's game laws . . . would materially affect or frustrate the Indians' governance of themselves or any commercial, conservationist or other program administered by the Indians for their own advantage." *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission* 588 F.2d 75, 78-79 (4th Cir. 1978). In this case, precisely that sort of showing was made.

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668 (1980), indicates that state regulation of an activity in which a tribe has no significant interest—and where the only effect on the tribe is to limit tribal revenues—does not infringe upon tribal self-government. *Id.* at 4673-74. However, such an effect still remains a factor to be considered, for "financial self-sufficiency" is "one major goal of tribal self-government." *Eastern Bank of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F.2d at 78. *See also White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897, 4901 (1980). The unquestioned importance to the Tribe of the game revenues contributed to the district court's determination that tribal self-government was infringed upon, and we affirm that finding.

Finally, we note that underlying the infringement test is a desire to promote the development of indigenous Indian institutions. Congress has declared that its policy is "to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources." 25 U.S.C § 1451. If we were to permit state interference with the tribal scheme, we would be effectively "deny[ing] Indians the opportunity of developing their own system." *Chino v. Chino*, 90 N.M. 204, 561 P.2d 476, 479 (1977). The federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the State.

IV. Environmental Concerns

This nation has recently begun to recognize the fragility of the natural environment. However, the federal system, whose competing sovereignties serve to protect individual liberties, may not provide the optimum environmental regulatory scheme. The State suggests that, whatever the justification for exclusive tribal regulation under a traditional legal analysis, the seriousness of ecological problems creates an implied exception in this case. The State proclaims that "its management efforts are directed to biological rather than political units," Brief for Appellant at 27, so state regulation should be allowed.

The State vastly overstates its case. Just as wildlife does not respect reservation boundaries, it also does not respect the boundaries of states. The State surely does not mean to suggest that it ignores *state* boundaries in its enforcement efforts. Somewhat inconsistently, the State also maintains that, "[s]ince wildlife exists in widely varying conditions throughout the United States," "there is no dominant federal interest which requires preemption." Brief for Appellant at 55. The State's "biological

units" argument would seem logically to *prefer* federal regulation, because only that regulation can take account of the varying conditions without the restraints of political boundaries. Hence, if ecological necessities were to require changes in constitutional arrangements—a position we certainly do not endorse—the changes would not necessarily be those suggested by the State.

In its ecological analysis, the State misinterprets Supreme Court language declaring the common law duty of a "state in its sovereign capacity" to protect wildlife "for the common benefit of all of its people." *LaCoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). That language does not describe the ecologically optimum vehicle for regulation of wildlife. Nor does it require that only one sovereign, the State, participate in wildlife management. Instead, it is descriptive of the trusteeship duty imposed on *all* sovereigns. The Tribe as a sovereign has undertaken that duty, as the State concedes, in an exemplary fashion, vastly improving the wildlife habitat on the reservation. Therefore, the Ninth Circuit's reasoning in *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980)—that simultaneous state regulation is permissible if the stated purpose is "conservation and proper management of game and fish," 604 F.2d at 1166—simply does not extend to this case. Based on the Tribe's record in wildlife management, we, unlike the Ninth Circuit, are *not* "convinced that the preservation and improvement of the stocks of fish and game," *id.* at 1170, requires dual regulation.

V. Enforcement

Our analysis has indicated that the Tribe has plenary power over reservation wildlife management. In this section we consider whether the absence of tribal criminal jurisdiction over non-members necessitates a cutback in that power.

New Mexico relies heavily on an enforcement vacuum that would allegedly exist if the State could not assert its criminal jurisdiction over the Indian reservation. The State insists that "[c]riminal jurisdiction over non-Indian hunters and fisherman [*sic*] is indispensable to effective management." Brief for Appellant at 36. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), effectively repudiated tribal criminal jurisdiction over non-members, and 18 U.S.C. § 1165,[19] it is argued, gives the United States jurisdiction over trespass only. Hence, the State maintains that without state criminal sanctions, violations by non-members would go unpunished and enforcement would be impossible. We believe New Mexico has overstated the effect of *Oliphant* and the need for *criminal* jurisdiction, and has underestimated the potential reach of § 1165.

New Mexico's interpretation of *Oliphant* would lead to the untenable conclusion that the Supreme Court implicitly abolished most aspects of tribal sovereignty, while at the same time asserting the continuing validity of that doctrine.[20] Many tribal powers that derive from inherent

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[19] Section 1165, entitled "Hunting, trapping, or fishing on Indian land," reads:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

[20] Recent Supreme Court reiterations of the continuing importance of tribal sovereignty are legion. *See, e.g.*, Santa

(*footnote continues*)

sovereignty would perhaps best be enforced through criminal sanctions. However, the *Oliphant* Court clearly did not intend to end all traditional tribal authority, including, for example, the taxing power—a power this court has recently reaffirmed. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980)(en banc). In fact, the Supreme Court has recognized the limited nature of the *Oliphant* holding. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4673 (1980).

Many regulatory schemes, at all levels of government, exist without criminal sanctions for enforcement purposes. New Mexico itself relies in part on civil sanctions in its hunting and fishing enforcement scheme. *See, e.g.*, N.M. Stat. Ann. § 17-2-26 (1978). Although the Tribe may not assert criminal jurisdiction over non-members, the Supreme Court has at no time denied the power of an Indian tribe to assert its civil powers. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). *See also Williams v. Lee*, 358 U.S. 217 (1959). There is no inconsistency in the existence of tribal regulatory power without the availability of criminal sanctions. *Cf. United States v. Montana*, 604 F.2d 1162, 1165 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980). Included in the Tribe's unquestioned authority is the power to expel those who violate tribal ordinances on the reservation. *See Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

(*footnote continued*)

Clara Pueblo v. Martinez 436 U.S. 49, 55-56 (1978); United States v. Wheeler, 435 U.S. 313, 322-28 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); United States v. Antelope, 430 U.S. 641, 646 (1977); United States v. Mazurie, 419 U.S. 544, 557 (1975).

We reject the State's assertion that we must imply a divestiture of tribal sovereignty in any area in which the Tribe becomes involved with non-members. The Supreme Court has noted that "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe," *United States v. Wheeler*, 435 U.S. 313, 326 (1978), but the Court did not mean that sovereignty has necessarily been divested whenever a tribe's external relations are involved. The divestiture found in *Oliphant* is of a very special sort, and "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 508 (1979). *See* Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L. Rev. 1459, 1467-69 (1979).

Even if tribal civil sanctions are not sufficient to provide efficient wildlife regulation, the criminal authority of the United States under 18 U.S.C. § 1165 could be interpreted broadly enough to fill much of any enforcement vacuum. When a non-member violates, for example, a tribal bag limit, he can be considered to have gone upon tribal land "without lawful authority or permission." His permission to enter was conditioned upon his observance of tribal game regulations.[21] The scienter element of the statute does not require for conviction that the offender

[21] This interpretation of § 1165 may differ in spirit from that of the Ninth Circuit: "[S]ection 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation." United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976) (quoting State v. Danielson, 427 P.2d 689, 691 (Mont. 1967)). However, we do not believe that it differs in substantive result. It is sufficient for purposes of providing an enforcement mechanism that § 1165 be read merely as an anti-trespass statute.

intended to violate tribal lawful authority when he entered the land. The requirement is only that he "knowingly goes upon any land . . . for the purpose of hunting, trapping, or fishing thereon." If the statute does leave an enforcement vacuum, it would be for that very limited class which enters the reservation with no intent to participate in hunting, trapping or fishing and then violates the tribal game ordinances.

VI. Effect of Injunction

We must address one final question, an alleged lack of clarity in the district court's order. That ambiguity reflects, it is argued, the application of improper standards in granting injunctive relief. The State suggests that the district court's injunction provides incomplete relief to the Tribe because it expressly governs only "acts done on the Reservation" and does not address the State's claimed power to regulate *possession* of game off the reservation. Brief for Appellant at 23-24.

No dilemma exists. The simple answer is that, absent justification, the State may not discriminatorily prohibit possession of game lawfully obtained from the reservation while permitting possession of game obtained elsewhere. *See* N.M. Stat. Ann. § 17-2-7A(2) (1978). A proper game license from another state is presumably a defense to a New Mexico prosecution for possession of game without a New Mexico license. The same principle applies to game obtained on the reservation with a proper tribal license. Unless New Mexico is willing to prohibit possession of game altogether, it may not prohibit possession of game legally obtained from a source outside the State's jurisdiction. The Supreme Court has recently stressed that a state's historic interest in protection of wild animals, *see Geer v. Connecticut*, 161 U.S. 519 (1896), does not extend to

the "*ownership* of game that had been lawfully reduced to possession." *Hughes v. Oklahoma*, 441 U.S. 322, 327 (1979).

The district court's injunctive order properly protected its declaratory judgment.

AFFIRMED.

No. 78-1790—Mescalero Apache Tribe v. State of New Mexico

BREITENSTEIN, Circuit Judge, concurring in the result.

I concur in the result. In my opinion New Mexico may not enforce its fishing and hunting laws on the Mescalero Apache Reservation. The Tribe has the right of self-government. See Joe v. Marcum, 10 Cir., ____F.2d____, Nos. 78-1912 and 78-1932, opinion filed May 16, 1980. The control which the Tribe has exercised over fishing and hunting is reasonable. The Supreme Court has long been solicitous in its protection of the fishing and hunting rights of Indians. Cheyenne-Arapaho Tribes v. State of Oklahoma, 10 Cir., 618 F.2d 665, 669. Dual Tribe and State control may be appropriate as an aid in the conservation of fish and game. Id. at 667. The instant record shows no need for joint conservation measures. The right of the State to regulate off-reservation possession of game lawfully reduced to possession in accordance with Tribal law is foreclosed by Hughes v. Oklahoma, 441 U.S. 322, 327, 335-336.

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

v.

No. 77-395-M
Civil

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors
in Office,

Defendants.

JUDGMENT AND INJUNCTION

This case having come on for non-jury trial, the evidence having been heard and the arguments considered, a memorandum opinion has been entered which constitutes the findings of fact and conclusions of law; and having found the issues in favor of the plaintiff and having concluded that the plaintiff has made the requisite showing for issuance of an injunction against the defendants; Now, Therefore,

IT IS ORDERED that judgment is hereby entered against the defendants, and in favor of the plaintiff, the Mescalero Apache Tribe; and the hunting and fishing laws and regulations of the State of New Mexico are hereby declared inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the Mescalero Apache Reservation and jurisdiction to regulate

hunting and fishing within the Mescalero Apache Reservation is hereby declared to rest with the Mescalero Apache Tribe and the United States to the exclusion of the defendant the State of New Mexico; and

IT IS FURTHER ORDERED that the defendants or their agents are permanently enjoined from enforcing New Mexico hunting and fishing laws and regulations against any person either on the Reservation or after they have left the Reservation for acts done on the Reservation.

United States District Judge

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

v.

No. 77-395-M
Civil

STATE OF NEW MEXICO and
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and as Director of the New
Mexico Department of Game
and Fish, or his Successors
in Office,

Defendants.

MEMORANDUM OPINION

The plaintiff, the Mescalero Apache Tribe, brought this action against the State of New Mexico for declaratory and injunctive relief. The plaintiff contends that the United States has authorized the Mescalero Apache Tribe exclusively to manage and to regulate the hunting and fishing resources on the Mescalero Apache Reservation and that the State of New Mexico is unlawfully infringing upon this exclusive jurisdiction, thereby violating the Tribe's right of self-government. The plaintiff seeks a judgment that New Mexico's hunting and fishing laws and regulations are inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the plaintiff's Reservation and that jurisdiction to regulate hunting and fishing within the Mescalero Apache Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of the defendant. The

plaintiff also seeks to permanently enjoin the defendant State from enforcing its hunting and fishing laws and regulations against any person, either on the Reservation or after they have left it, for acts done on the Reservation. The following will constitute my findings of fact and conclusions of law. I conclude in favor of the plaintiff.

The plaintiff invokes federal jurisdiction pursuant to 28 USC 1331 and 28 USC 1362. Jurisdiction is present. The defendant raises the issues of ripeness and standing. The defendant, in addition, argues that the United States and the Secretary of the Interior are indispensable parties to the plaintiff's action. There is no basis to these contentions.

A justiciable controversy exists here. Even though one hunting season has ended, another is imminent. State enforcement of its laws and regulations against persons hunting and fishing on the plaintiff's Reservation persists. In the defendant's proposed findings of fact, the defendant states: "The State of New Mexico has enforced and intends to continue to enforce its hunting and fishing laws and regulations against non-Indians hunting and fishing on Indian lands, including the Mescalero Apache Reservation." The case is not moot and the plaintiff has standing to litigate. The plaintiff alleges injury in fact and an interest within that zone of interests protected by the constitutional guarantee in question. See: *Assoc. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

A determination that New Mexico game laws are not applicable to non-Indian activity within the Mescalero Apache Reservation cannot injuriously affect the interests of the United States and the plaintiff has a legal right to bring this action in its own behalf. Neither will a determination in this cause affect the Secretary of the Interior; no act would be required of the Secretary

regardless of the outcome of the suit. The defendant's contentions regarding indispensable parties, therefore, are without basis.

The parties have stipulated that the Mescalero Apache Tribe is a federally recognized Indian Tribe governed by its revised constitution of January 12, 1965, which was adopted pursuant to 25 USC 476. The governing body of the Mescalero Apache Tribe is duly recognized by the United States Secretary of Interior. The Tribe signed a treaty with the United States on July 1, 1852, which submitted the Tribe and its members to the laws, jurisdiction, and government of the United States of America. Article 9 of the Treaty provided that the United States government would designate, settle and adjust the boundaries of the Mescalero Apache lands. The Reservation of the Mescalero Apache Tribe was originally created by a Presidential Order in 1873, was modified by subsequent Executive Orders, and was established as it presently exists by an Executive Order dated March 24, 1883. The Reservation is located entirely within the State of New Mexico in the aboriginal territory of the Mescalero Apache.

Over the past several years the Mescalero Apache Tribe has developed an extensive tourism program designed to bring income and employment to the Reservation. As a part of that program and in order to better manage and control its wildlife resources the Tribe, pursuant to its constitution, has adopted hunting and fishing ordinances requiring tribal licenses, setting bag limits, and establishing programs and seasons for hunting and fishing on the Reservation. The Tribe's 1977 ordinances were duly approved by the Secretary of Interior. The Tribe benefits economically from hunting and fishing revenues. Fees from tribal licenses provide individual tribal members a wide range of governmental and social services. The Tribe employs seven full-time conservation

officers who assist a Bureau of Indian Affairs range conservationist with game management, aerial surveys, and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Reservation.

In 1966 and 1967 the National Park Service donated an elk herd to be released on the Mescalero Apache Reservation. At that time it was estimated the elk in the general area of the Reservation numbered 13; the herd imported from Wyoming numbered 162. Although the antelope population on the Reservation is non-migratory, the elk range freely on and off the Mescalero Apache Reservation throughout the year. Since elk were planted in 1966, however, the Tribe has placed several wells in areas previously unable to support cattle because of absence of water. This considerable amount of range development has removed cattle from direct competition with elk in the higher parts of the Reservation. The Reservation is well suited to support elk as well as other game and the elk population in the area is now estimated at 1200.

The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a National Fish Hatchery on the Reservation and provides technical assistance in the management and development of fishery resources in Reservation waters. There are no natural lakes within the boundaries of the Reservation. Several man-made lakes have been constructed with federal funds and are stocked from the National Fish Hatchery.

Within the boundaries of the Mescalero Apache Reservation the State of New Mexico, in the last eight years, has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places. The State has not adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or

administration of fish resources, and has undertaken no wildlife restoration projects. In short, the Tribe conducts its complete fish and game management program exclusive of the State of New Mexico.

The State, nevertheless, has been actively prosecuting non-Indians for violation of New Mexico hunting and fishing laws for acts committed within Reservation limits that did not violate tribal law. Section 53-2-31 N.M.S.A. 1953 Comp. states that the hunting and fishing laws of the State are applicable to "... all Indians off the reservation within the state or coming into the state from adjoining states, and to all persons hunting on any Indian reservation within the state..." except that no Indian is required to have a license to hunt or fish within the limits of the reservation where he resides. This conflicts with the law of the Tribe. Mescalero Apache Tribal Ordinance 77-1 provides: "No state license of any kind shall be necessary for any person." Other conflicts between State and Tribal regulations exist with regard to bag limits, fishing licenses, hunter training course requirements, and season dates. New Mexico 1978 Big Game Proclamation begins the antelope season on August 29, 1978; Tribal Ordinance 78-3 begins the antelope season on the Reservation on August 28, 1978. The State's hunting proclamation prohibits anyone who held an elk license in 1977 from applying again in 1978. The Tribe has no such restriction. The same New Mexico prohibition applies to antelope licenses, but the Tribe has no such restriction. Thus the present suit arises.

"As a basic proposition it is clear that Indians traditionally enjoyed the exclusive right to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty." *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 412 F. Supp. 651, 654 (1976). See also: *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Thus before the Mescalero

Apache Tribe signed the Treaty of July 1, 1852, it had inherent and complete authority to control the fish and game found within the confines of the tribal territory. This right was part of the Indians' "larger rights" and was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). It was not surrendered by the Treaty of July 1, 1852. Even though the Treaty is silent as to hunting and fishing rights, it must be viewed as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id.* A tribe reserves its right to control hunting and fishing in the area in which it resides whether or not such right is specifically mentioned in a treaty. *Menominee Tribe v. United States, supra.* Whether the reservation on which the right is to be exercised is created by Executive Order or by treaty makes no difference. *Antoine v. Washington*, 420 U.S. 194 (1975). A treaty is to be construed liberally and not to the prejudice of the Indians. *United States v. Winans, supra. Antoine v. Washington, supra. McClanahan v. Ariz. State Tax Commission*, 411 U.S. 164 (1973).

Aboriginal possession "creates a possessory right legally enforceable against everyone except the United States." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 342 (1941). *United States v. Tillamooks*, 329 U.S. 40 (1946). Such right can be limited or abolished only by the United States. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *United States v. Mazurie*, 419 U.S. 544 (1975). Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long As Water Flows, or Grass Grows Upon the Earth'—How Long a Time Is That?", 63 *Calif. Law Rev.* 601 (1975). No Presidential act and no federal legislation since 1852 has abrogated either the Treaty of July 1, 1852 or the Mescalero Apache Tribe's right to control hunting and fishing on its Reservation.

Whether the test for finding an abrogation of treaty rights is "a clear showing of legislative intent", "not lightly implied" or "express legislative reference" need not be decided. By any of these measures the Mescalero Apache Tribe has not lost its hunting and fishing rights.

This conclusion is reinforced by specific federal legislation, including 18 USC 1165. See: S. Rep. 1686, 86th Cong. 2d Sess. (1960). Section 1165 makes it a crime to go upon Indian lands for the purpose of hunting, trapping or fishing without permission of the tribe. The tribe decides who may and who may not hunt and fish within its reservation. This power is confirmed, as well, in the Indian Reorganization Act of 1934, 25 USC 461 et seq. Title 25 USC 1321, the successor to Public Law 280, gives some states limited jurisdiction over specified Indian affairs, but exempts "any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing or regulating thereof." Public Law 280 is not applicable in New Mexico. Its language and that of Section 1321 (b), however, indicate a congressional policy to allow all Indian tribes self-government in specific areas including fish and game regulation and, in those states such as New Mexico which are not Public Law 280 states, to allow tribes self-government in other matters as well. Hence, in addition to aboriginal and treaty rights, Congress has clearly allowed Indian tribes, including the Mescalero, continued powers over reservation hunting and fishing.

Does this right exist in the tribe exclusively? The recent case of *White Mountain Apache Tribe v. State of Arizona*, No. 77-867 Civ., D. Ct. Ariz., Decided June 13, 1978, holds that it does not. Predicated on dual state-tribal jurisdiction over Indian lands and lack of specific legislative authority delegating to the White Mountain Apache Tribe power to preempt state fish and game laws,

the case concludes in favor of the State because "the overlapping jurisdiction of state and tribal law to non-Indian on-reservation hunting and fishing does not significantly infringe on a legitimate tribal interest in self-government."

The Court in *White Mountain Apache* finds that United States ownership of land within a state's boundaries does not withdraw the land from the jurisdiction of the state. I find, likewise, that the State of New Mexico has jurisdiction over some federal lands within its boundaries. But as to state jurisdiction there exists not one, but several different situations. Little similarity exists, for example, between the exercise of state jurisdiction on national forest lands and the exercise of state jurisdiction on military reservations. Federal jurisdiction over public lands "may range from exclusive federal jurisdiction with no residual state police power (cites omitted), to concurrent, or partial, federal legislative jurisdiction which may allow the State to exercise certain authority." *Kleppe v. State of New Mexico*, 426 U.S. 529, 542 (1976). Land owned by the United States cannot be considered as if it were of one kind only. To find, as the Court in *White Mountain Apache* does, that states have concurrent jurisdiction over all federal land within their boundaries is not consistent with the law I read on the subject. Such a general conclusion neglects to consider what is essential to the question of jurisdiction in Indian country: the Commerce Clause and the Supremacy Clause of the United States Constitution and a long line of federal Indian cases beginning with *Worcester v. Georgia, supra.*

The Constitution, Article I, Section 8, gives the Federal government plenary power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." *Worcester v. Georgia, supra*, examined the Commerce Clause and the basic relationships

among tribal, state and federal governments. *Worcester* held that the Constitution gives to the federal government plenary power to regulate Indian affairs and that, because Indian territory is territory distinct from that of a state, state laws do not apply within its boundaries. In one of many passages that remain a basis of contemporary Indian law, *Worcester* speaks of "the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State, within whose chartered limits they might reside, by a boundary line, established by treaties; that the whole power of regulating the intercourse with them was vested in the United States." 8 Law. Ed. at 501.

No doubt *Worcester v. Georgia* has been modified. *Oliphant v. Suquamish Indian Tribe*, U.S. Supr. Ct. Slip Op. No. 76-5729, Decided March 6, 1978, qualified the scope of tribal powers by limiting tribal criminal jurisdiction. Yet the broad principles of *Worcester*, that the federal government has plenary authority in the regulation of Indian affairs and that Indian people are sovereign nations apart from the states, stand. *Williams v. Lee*, 358 U.S. 217, 219 (1959). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, U.S. Supr. Ct. Slip Op. No. 76-1629, Decided March 22, 1978. See also: *McClanahan v. Arizona State Tax Commission*, *supra*.

The Court in *White Mountain Apache v. State of Arizona*, *supra*, purports to find, first, state authority to extend its police powers to affairs on Indian reservations, and then looks for legislative authority permitting the

Indian tribe to preempt this state law. I take a different approach. I conclude from the Constitution, the Treaty of July 1, 1852, and the case law that authority to regulate on the Mescalero Apache Reservation, or on any Indian reservation, rests entirely in the federal government and, although Congress can relinquish to the several states aspects of its jurisdiction over Indian affairs, the intent of Congress to give up any part of such authority must be clear. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). *Bryan v. Itasca County*, 426 U.S. 373 (1976). It is legislation giving New Mexico authority to regulate on the Mescalero Apache Reservation that I must look for but do not find.

The defendant argues that because the State of New Mexico receives federal matching funds under the Pittman-Robertson Act, for wildlife management, and the Dingle-Johnson Act, for fish management, calculated by a method that includes the land area of the Mescalero Apache Reservation, Congress must be intending that the State of New Mexico exercise jurisdiction over the Reservation. The legislation in question does not meet the test of clear legislative intent. "Certain state laws have been permitted to apply to activities on Indian reservations *where those laws are specifically authorized by Acts of Congress*, or where they clearly do not interfere with federal policies concerning the reservations." *Warren Trading Post Co.* v. *Ariz. Tax Commission*, 380 U.S. 685, 687 (1965), emphasis added. The legislation cited by the defendant simply employs a formula adaptable to dissimilar situations, including those where an Indian reservation consents to a State's wildlife management scheme. In the instant case the Mescalero Apache Tribe conducts its own management program and enforces its own regulations; and the federal legislation in question is insufficient by itself to give the State of New Mexico authority to intervene.

I am not saying that it is 18 USC 1165 that prevents the defendant here, the State of New Mexico, from interfering with tribal fish and game regulation on the Mescalero Apache Reservation. In the case of *United States* v. *Sanford*, 547 F2d 1085 (9th C. 1976), the Court reasoned that 18 USC 1165 did not constitute an attempt by Congress to enter the field of fish and game regulation. The *Sanford* case held that Montana fish and game laws did apply on the Crow Indian Reservation. But the *Sanford* case and the present one differ significantly. I find with the Mescalero Apache Tribe a comprehensive fish and game policy together with an adequate and enforceable set of tribal ordinances. *United States* v. *Sanford, supra*, did not reach the question presented by the facts in the present case. In the absence of tribal ordinances, no law of the Crow Reservation conflicted with Montana law. In the absence of federal action regarding hunting and fishing on the Crow Reservation, Montana law could not be said to interfere with federal policies. Thus, despite specific authority, in the lack of conflict state law could be permitted to apply on the Reservation. I note, however, that the Court in *Sanford* stated: "We express no opinion concerning the possible concurrent application of tribal law to non-Indians on Indian reservations under the circumstances of this case", 547 F2d at 1089.

Reading *United States v. Sanford* with *United States v. Finch*, 548 F.2d 835 (9th C. 1977), I understand the Ninth Circuit to recognize those same Indian rights I have discussed and to consider 18 USC 1165 for the same purposes for which I have considered it. As the Court said in *Finch*, "The language and the history of 18 USC 1165 show that the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law." 548 F.2d at 834.

What I do believe prevents the exercise of state fish and game jurisdiction on the Mescalero Apache Reservation is federal preemption of the field. On July 1, 1852, the Mescalero Apache Tribe, in Article One of the Treaty, placed itself "exclusively under the laws, jurisdiction, and government of the United States." The New Mexico Enabling Act, 36 Stat. 557 (1910) states:

> All right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

The defendant maintains that absolute jurisdiction is not exclusive jurisdiction. Because of the Supremacy Clause of the United States Constitution, however, even in a field where a state might legislate, or where state law could be applied absent federal law in the area, a state's power is subordinate to federal law. Once Congress has chosen to adopt a comprehensive, integrated scheme of regulation in a given area, state action is precluded. *Hines v. Davidowitz*, 312 U.S. 52 (1940). *Warren Trading Post Co. v. Arizona Tax Commission*, *supra*.

White Mountain Apache Tribe v. State of Arizona, *supra*, rejected the preemption argument and used an infringement test analysis. The infringement test is clearly set out in *Williams v. Lee*, *supra*: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. The infringement test is coupled in *Williams v. Lee* with the preemption doctrine,

that is "absent governing Acts of Congress." Subsequent cases have never used the infringement test by itself; it is a concomitant consideration. *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

I understand that New Mexico's hunting and fishing laws are not enforced against members of the Mescalero Apache Tribe on their own Reservation and that no State officers go on the Mescalero Apache Reservation to enforce against non-Indians. Notwithstanding New Mexico's present enforcement policies, the Mescalero Apache Tribe is fully able to govern its own members. On the other hand, revenues from tribal hunting and fishing licenses greatly benefit the Mescalero Apache Tribe. The Tribe owns and operates a large hotel on its Reservation. Tourism is a major source of tribal income and revenues from tourists attracted by fishing and hunting on the Reservation contribute substantially to the Tribe's financial welfare. These facts are substantially the same as those in *Eastern Band of Cherokee Indians v. State of North Carolina Department of Natural and Economic Resources*, Civ. No. BC-C76-65, D. Ct. W.D. No. Carol., Decided August 27, 1976. In *Eastern Band of Cherokee Indians*, the United States, as in this case, had provided financial and technical assistance to a tribal wildlife program; the Tribe had enacted extensive regulations regarding hunting and fishing on the Reservation; the Tribe had a well-developed tourism program; and enforcement of the state's hunting and fishing laws, even as against non-Indians only, had a direct impact upon the revenues of the Tribe. Infringement was not the test relied on, however; the Court based its holding on preemption. "This Court finds and concludes that the federal government has assumed comprehensive supervision and management of trout fishing on the Reservation and has thereby preempted this field, and has delegated its regulatory power to the plaintiff, Eastern Band of Cherokee Indians. It therefore follows

that the State has no authority to levy and collect the fishing license fee." *Eastern Band of Cherokee Indians, supra*, cf. *Confederated Tribe of the Colville Indian Reservation v. State of Washington, supra*. Whether or not the defendant's actions in the present case, then, infringe on the self-government of the Mescalero Apache Tribe is not the principle consideration.

Confederated Tribes of the Colville Indian Reservation v. *State of Washington* is another case similar in facts to the one at hand. The Colville Indian Reservation was established by Executive Order on July 2, 1972. The Colville Indians have developed a program of sport fishing and tourism on the reservation and have been supported by the financial and technical assistance of the United States Fish and Wildlife Service. The Tribes have a set of fishing ordinances and regulations requiring tribal licenses but not a license from the State of Washington. When the State attempted to enforce its license requirement on non-Indians fishing within the boundaries of the Colville Reservation, the Tribes brought suit. The Court concluded that the Indians had fishing and hunting rights not relinquished by treaty, that although some tribal jurisdiction had been taken from the Tribes and given to the State of Washington by express provisions of Public Law 280, the Colville Indians had retained their jurisdiction over hunting and fishing, and that "Since plaintiff (tribes) has enacted a comprehensive program for the administration of tribal fisheries resources as authorized by the proviso of Section 1162(b), any state infringement of the tribes' exercise of this regulatory power would violate the Supremacy Clause." 412 F.Supp at 655. "Further, the exercise of such delegated powers has the same force and effect under the Supremacy Clause as if exercised by the federal government directly." *Id.*

United States v. *Mazurie, supra*, dealt with the delegation of Congressional authority to an Indian tribe. The

Wind River Tribes in Wyoming had adopted an ordinance which permitted liquor sales on the reservation, but which, in 1971, was amended to require both a state and a tribal license. In 1972, Mazurie applied for a tribal license and the license was denied. Mazurie continued his liquor sales without a tribal license until federal officers seized the alcoholic beverages and a criminal prosecution was initiated. The tribal court entered judgments of conviction; the Court of Appeals reversed on the grounds that the prosecution had failed to prove the bar was not excluded from "Indian country" under the exception for fee-patented lands and that the tribal ordinance was an invalid delegation of Congressional authority. The Supreme Court held, as to the second ground, that the delegation of federal authority to the Indian tribe was proper. The Court stated at 556-557:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. (Cite omitted.) Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. (Cite omitted.) Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of Sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations . . . ," *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973).

The fish and game ordinances and regulations of the Mescalero Apache Tribe, therefore, authorized and sanctioned by the federal government and accompanied by active federal support of the fish and game program on

the Mescalero Reservation, provide the integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation. The United States had acted in the exercise of its fiduciary duty to an Indian tribe. It has, additionally, permitted tribal regulations reaching non-Indians that, had it wanted, the federal government itself could have enacted. As stated in *Eastern Band of Cherokee Indians, supra:*

> . . . these governmental acts, under congressional authority and approval, relate to the exercise of guardianship and protection over the Eastern Band and . . . such acts reasonably relate to the Tribe's economic welfare. It is a valid governmental function consistent with its fiduciary relationship with the Tribe, and under the facts of this case, preempt the State's regulation. It follows that the United States, in conjunction with the Eastern Band, is entitled to regulate and maintain the fish management program on the Cherokee Reservation with the interference of the State.

Coupled with the federal policy of Indian self-determination, all of these considerations lead me to the conclusion that the combined actions of the United States and the Mescalero Apache Tribe establish in the United States and the Mescalero Apache Tribe an exclusive jurisdiction over hunting and fishing on the Mescalero Apache Reservation and prevent the State of New Mexico from enforcing its fish and game laws and regulations against any person, Indian or non-Indian, for acts committed within the boundaries of the Reservation.

The record indicates that the defendants or their agents might continue enforcement of New Mexico hunting and fishing laws against persons hunting and fishing on the Mescalero Apache Reservation and that if this

occurred the plaintiff would suffer irreparable harm and stand without a remedy at law. I conclude that a permanent injunction against the defendant is warranted. A judgment and injunction will be entered consistent with this opinion.

UNITED STATES DISTRICT JUDGE

Treaty With The Apaches, July 1, 1852, 10 Stat. 979 (1852)

Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power they do hereby submit.

Article 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's [sic] that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

The New Mexico Enabling Act, 36 Stat. 557 (1910)

All right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Indian Reorganization Act of 1934, 25 U.S.C. § 476

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revokable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

Public Law 83-280, as amended, 18 U.S.C. § 1162(b)

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.